Supreme Court, U.S.
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No. 08-792

IN THE

Supreme Court of the United States

NATHANIEL GRAY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether an application and order for a Title III wiretap that completely fails to notify the issuing judge that the application had been approved by any specially designated Department of Justice official requires a court to comply with the statutorily authorized suppression remedy or whether it can refuse to comply on the basis of vague, extra-record assurances years after the wiretap order was issued and whether such a refusal to suppress affects the fulfillment of the reviewing or approval functions required by Congress?

2. Does the Hobbs Act prohibition on "extortion . . . under color of official right," 18 U.S.C. § 1951, permit the prosecution of private persons, under a conspiracy or aider and abettor theory, as extortion perpetrators, acquiescors, or victims, or does it punish none of them and is the conflict in the circuits caused by the expansion of the Hobbs Act to include conduct not covered by the statute?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
REASONS FOR GRANTING THE PETITION	2
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Herring v. *United States*, 129 S. Ct. 695 (2009) 6
Spears v. *United States*, 129 S. Ct. 840 (2009) 6
United States v. *Anderson*, 39 F.3d 331 (D.C. Cir. 1994), *abrogated on other grounds by Richardson* v. *United States*, 526 U.S. 813 (1999) 5
United States v. *Chavez*, 416 U.S. 562 (1974) 2, 4
United States v. *Ford*, 414 F. Supp. 879 (D.C. Cir. 1976), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977) 3
United States v. *Giordano*, 416 U.S. 505 (1974) 3, 4, 5, 6
United States v. *Gray*, 372 F. Supp. 2d 1025 (N.D. Ohio 2005) 3
United States v. *Staffeldt*, 451 F.3d 578 (9th Cir. 2006) 3, 5, 8

STATUTES

18 U.S.C. § 1951 i
18 U.S.C. § 2518(10) 2, 3

LEGISLATIVE HISTORY

S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112 ..... 2, 5

TABLE OF AUTHORITIES—continued

Page

OTHER AUTHORITIES

Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act Orders 1979–2007* (May 2, 2008), http://epic.org/privacy/wiretap/stats/fisa_stats.html 9

U.S. Courts, *Authorized Intercepts Granted Pursuant to 18 U.S.C. 2519 as Reported in Wiretap Reports for Calendar Years 1996–2006*, http://www.uscourts.gov/wiretap/authorizedintercepts 2006.pdf (last visited Feb. 9, 2009) 8

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that statutory requirements for the issuance of all warrants, especially those involving wiretaps, are fully met. The underlying decision here permits *post hoc* justification that undermines not only the statute, but confidence in the integrity of important procedures intended to protect against invasive scrutiny of our confidential

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

communications. The Sixth Circuit's flawed rationale consequently has opened a significant split with other circuits that should be resolved in favor of Petitioner.

REASONS FOR GRANTING THE PETITION

ARGUMENT

Wiretap applications and orders that do not identify the authorizing official on their face or otherwise (such as in an appendix) violate Title III's plain statutory language. 18 U.S.C. §§ 2518(1)(a) and 2518(4)(d) require the wiretap application and order to *list* the authorizing officer. An application or order missing the authorizing officer is therefore facially insufficient and offers no indicia that the application is authorized at all. Where the listing requirement is not met, Title III unambiguously requires suppression. See 18 U.S.C. § 2518(10)(a)(ii) (evidence must be excluded when "the order of authorization or approval under which it was intercepted is insufficient on its face"). With respect to exclusion, § 2518(10)(a) thus "provides the remedy for the right created by section 2515" and it is "intended to be comprehensive." S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2195.

Applications and orders lacking the authorizing official altogether are unlike applications which misidentify the authorizing official. This Court recognized as much in *United States* v. *Chavez*, when it said: "We cannot say that misidentification was in any sense the omission of a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III." 416 U.S. 562, 573 (1974). Applications and orders with misidentifications are "facially sufficient" because the applications apparently satisfy the statutory requirements.

United States v. *Giordano*, 416 U.S. 505, 525 n.14 (1974). A judge reviewing an application with a misidentified authorizing official can reasonably believe that the Department of Justice ("DOJ") has authorized the wiretap as required by 18 U.S.C. § 2516. *Id.* When, as here, no authorizing official is listed, no judge can reasonably find that the statutory requirements are satisfied.

Verbal communication that DOJ approval has been obtained cannot correct a facially insufficient application. *United States* v. *Staffeldt*, 451 F.3d 578, 583–84 & n.7 (9th Cir. 2006) (the government conceded that verbal communication of approval would not satisfy Title III); see also *United States* v. *Ford*, 414 F. Supp. 879, 884–85 (D.C. Cir. 1976) (Mem.), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977). This type of evidence is irrelevant when determining whether an application or order is facially sufficient. See *Staffeldt*, 451 F.3d at 583–84. And even if it somehow were relevant, the events of this case demonstrate that reconstructing "parole evidence" many years after the fact is a risk-laden exercise. Pet. 12-14; *United States* v. *Gray*, 372 F. Supp. 2d 1025, 1031 (N.D. Ohio 2005). Such evidence may be relevant when determining if an interception was lawful under 18 U.S.C. § 2518(10)(a)(i), but this Court has recognized that § 2518(10)(a)(i) is different from § 2518(10)(a)(ii). "[P]aragraph[] (ii) . . . must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)." *Giordano*, 416 U.S. at 527. The statutory language in paragraphs (ii) is much less ambiguous than the language used in paragraph (i). Compare 18 U.S.C. § 2518(10)(a)(i) ("the communication was unlawfully intercepted") with *id.* § 2518(10)(a)(ii) ("the order of

authorization or approval under which it was intercepted is insufficient on its face"). Extrinsic evidence thus will never be necessary to determine whether or not an application or order is valid on its face.

Informational omissions that directly and substantially affect the courts' statutory duties require suppression of the tainted evidence under § 2518(10)(a)(ii). Failure to list the authorizing official in the wiretap application or order is not a minor or technical insufficiency. "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *Giordano*, 416 U.S. at 515. Identification of the authorizing official in the application "facilitates the court's ability to conclude that the application has been properly approved" under 18 U.S.C. § 2516. *Chavez*, 416 U.S. at 575. Identification in the court's order "fix[es] responsibility" for the source of primary approval. *Id.* In omission cases, the court can perform neither of these functions.

Misidentifying a properly authorized official in a wiretap application or order is minor because the reviewing court can still perform its statutory duties. The court can conclude that a specified DOJ official has approved the wiretap applications and the court can fix responsibility with that official through the order approving the wiretap. *Giordano*, 416 U.S. at 525 n.14. These cases, however, are distinguishable from omission cases. Because a wiretap order cannot be issued without prior approval from the DOJ, the failure to list the authorizing official in the

application or order cannot be a minor facial insufficiency. *Staffeldt,* 451 F.3d at 579. Without this information, the court cannot perform its reviewing or approval functions. Accordingly, evidence obtained through a wiretap that fails to identify the authorizing official must be excluded under § 2518(10)(a)(ii).

Yet the rule announced by the Sixth Circuit in *Gray* allows the DOJ to circumvent one of the essential protections afforded to the public by Title III. By requiring law enforcement officials to explicitly authorize a wiretap prior to its execution, Title III decrees accountability in a process that by its very nature is open to abuse. Congress mandated accountability by, among other things, requiring that the "mature judgment of a particular, responsible Department of Justice official [be] interposed as a *critical precondition* to any judicial order." *Giordano,* 416 U.S. at 515–16 (emphasis added). It was also important to Congress that the responsible official is subject to the political process, which is not the case for either an Article III judge or for a federal law enforcement officer running an investigation. S. Rep. No. 90-1097, 1968 U.S.C.C.A.N. at 2185. Even as the number of officials who have the authority to sign off on a wiretap has expanded, the express intent of Congress to limit "such authority to identifiable officials in positions of trust" has been served. *United States* v. *Anderson,* 39 F.3d 331, 339 n.6 (D.C. Cir. 1994) (per curiam), *abrogated on other grounds by Richardson* v. *United States,* 526 U.S. 813 (1999).

The Sixth Circuit flouted this intent when it held that a wiretap application that completely omitted the authorization of an identifiable, authorized official should be treated like one that simply misidentified the responsible Department of Justice

official. Because this action violated plain statutory dictates and because the statute expressly provides a remedy, there can be but one result. Compare *Herring* v. *United States*, 129 S. Ct. 695, 700–01 (2009) ("[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." (alterations in original) (quoting *Illinois* v. *Krull*, 480 U.S. 340, 352–53 (1987))). The Sixth Circuit's decision here thus warrants review, if not summary reversal. *Spears* v. *United States*, 129 S. Ct. 840, 845 (2009) (the Court "should therefore promptly remove from the menu the [Sixth] Circuit's offering, a smuggled-in dish that is indigestible").

Further, the Sixth Circuit's holding that the wiretap should not be excluded, simply because it turned out that a Justice Department official had authorized the wiretap, does not protect privacy interests as Title III intended. It does not apply the approval of an authorized Department of Justice official as a "critical precondition," *Giordano*, 416 U.S. at 515–16, but instead as a technical detail that can be fulfilled at any point before or after the wiretap is executed. The acceptance of *post facto* explanations that serve to rationalize the facial insufficiency of the wiretap application contravenes Congress' intent that both the judicial and executive branches approve a wiretap before it is executed. Should the Sixth Circuit's ruling stand, an important statutory barrier protecting the public's privacy would be weakened. Law enforcement officials would be able to obtain wiretap authorization subject only to judicial approval, knowing that they would be able to rationalize executive approval later, possibly based on information gleaned from the wiretap. The

approach taken by the Sixth Circuit substitutes a legal approach that respects these interests with a court-sanctioned policy of "shoot first and ask questions later."

While the exclusionary rule has been read into the Fourth Amendment, Congress felt that the protection of the public was sufficiently important to reiterate an exclusionary requirement here. The wiretap protections here are legislative creatures added to the existing exclusionary rule, and should be interpreted to reach beyond the exclusionary rule's typical protections. As Congress realized, wiretaps are unlike searches conducted at a business, residence, or in one's vehicle, because by their very nature they implicate privacy interests beyond those of the targeted individual. When a phone is tapped, the privacy of everyone to whom that individual speaks by phone—be they co-conspirators or simply people the target is interested in talking to—is compromised. While an *ex post facto* approach might eventually suppress illegally gathered evidence, the invasion of the privacy of the target of the investigation, and just as importantly, of any individual who may contact the target by phone, cannot be undone.

Here, for example, petitioner Nathaniel Gray operated a consulting business while this investigation took place. This business had contacts with a wide range of legitimate businesses and private individuals. Those individuals, and the employees and owners of those businesses, have a privacy interest in the communications they make with consultants and clients. Congress recognized the need to protect the public from wide-ranging intrusions into this privacy interest when it created a "uniquely rigorous" system requiring approval from

two separate branches of government. *Staffeldt*, 451 F.3d at 580 (citing *Giordano*, 416 U.S. at 515). By allowing a wiretap application facially supported by only one of these branches to stand, the Sixth Circuit circumvented the safeguards Congress explicitly enacted.

In addition, following the plain text of the statute would simplify the decisions courts and court officials have to make going forward. In cases like this one, courts following the Sixth Circuit's analysis must decide whether the DOJ authorized a wiretap, which can require extensive fact finding—including the existence of external documents and testimony of voice authorization, which would then be open to attacks by defendants on the grounds of *ex post* fabrication. This would encourage litigating even borderline cases, as dubious wiretap applications introduce enough uncertainty that prosecutors and defendants each find circumstances that support their case. The Court's reiteration of Congress' bright line rule requiring courts to find explicit assent on the application by an authorized DOJ official would simplify this process, eliminating much of the gray area currently surrounding the legality of wiretap applications. It would also establish clear expectations for the use of techniques that Congress deemed sufficiently invasive as to be a last resort.

The consequences of allowing a court to approve wiretaps without DOJ accountability are wide ranging. Wiretap requests by law enforcement and intelligence officials have increased by almost 60% between 1996 and 2006. U.S. Courts, *Authorized Intercepts Granted Pursuant to 18 U.S.C. 2519 as Reported in Wiretap Reports for Calendar Years 1996 2006*, http://www.uscourts.gov/wiretap/authorizedintercepts2006.pdf (last visited Feb. 9, 2009).

While not covered directly by Title III, FISA wiretap requests more than tripled between 1997 and 2007. Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act Orders 1979–2007* (May 2, 2008), http://epic.org/privacy/wiretap/stats/fisa_stats.html. There is no indication that this trend will reverse itself, and advances in technology make it more likely, rather than less, that wiretaps will play a critical role in criminal investigations in the future. As these investigations take place, it follows that there will be disputes over the validity of wiretap applications. This Court now has the opportunity to ensure that Congress' explicit statutory directions are not degraded in general guidelines for those who wield this extraordinary and growing power, and establish guidelines the Justice Department and the judiciary can follow going forward.

This Court should now review the Sixth Circuit's decision in *Gray*. In doing so, it can reestablish the protections Congress intended to have in place for wiretapping procedures, and can ensure that the erosion of its precedent in *Giordano* is halted.

CONCLUSION

For these reasons, and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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